

In 2000, during consideration of the Paez nomination, the following Senator was among those who voted to continue the filibuster:

Senator Bill Frist —Vote #37, 106th Congress, Second Session, March 8, 2000.

Mr. DURBIN. Mr. President, to give credit to the authorship, my colleague, Senator BOXER of California, put her staff to work. She asked them to research how many times, in the history of the Senate, a filibuster had been used to slow down or deny a Federal judgeship. You see Senator FRIST and others have stood before the press and said it has never been done. These Democrats have dreamed up something that has never been done. Using a filibuster to stop the judicial nominee has never occurred. I have seen those quotes. Unfortunately, they are wrong.

Prior to the start of President Bush's administration in 2001, at least 12 judicial nominations needed 60 votes for cloture to end a filibuster: the first, 1881, Stanley Matthews to be a Supreme Court Justice; 1968, Abe Fortas to be the Chief Justice of the Supreme Court; and the list goes on. Twelve different judicial nominees that have been subject to filibuster, and they are not all in the distant past.

The most recent occurred during the Clinton administration. Two nominees that he sent, Richard Paez and Marsha Berzon to the Ninth Circuit Court of Appeals, were filibustered by the same Republican Senate side that now argues this has never happened.

We have seen this happen because of the filibuster—cloture—which is the way to close down the debate, close down the filibuster. Cloture motions were filed on two judicial nominations. It was done in 1986, Daniel Manion; in 1994, Rosemary Barkett.

Some of the comments made by Republican Senators in the last few years about the filibusters on Clinton judicial nominees tell the story.

Senator Bob Smith of New Hampshire, in March of 2000, said, as follows, on the floor of the Senate in the official RECORD, the CONGRESSIONAL RECORD of the Senate. Here is what he said:

... it is no secret that I have been the person who has filibustered these two nominations, Judge Berzon and Judge Paez.

He also said:

So don't tell me we haven't filibustered judges and that we don't have the right to filibuster judges on the floor of the Senate. Of course we do. That is our constitutional role.

I hear Senators now saying, on the Republican side, it has never been done, no one has ever considered it. In fact, it has happened—and repeatedly—in our history.

In fact, in the year 2000, during consideration of the Paez nomination, there was one Senator who voted to continue the filibuster against Judge Paez. Who was that Senator? Senator BILL FRIST, the majority leader of U.S. Senate. His own action speaks volumes. He understood then there was a filibuster on a Democratic nominee,

and he joined them in filibustering it. It is a matter of record, vote number 37, 106th Congress, second session, March 8, the year 2000. This is all in the CONGRESSIONAL RECORD.

So there is no question we have used the filibuster on judicial nominees. It is not an extraordinary thing in terms of our rules. It is extraordinary in terms of the number of occurrences. But I think it tells us, if you look at the history and precedent of the Senate and the use of this Constitution, that the right of the filibuster on a judicial nominee is protected by this Constitution.

So now comes the Republican majority. They say they are going to break the rules of the Senate to eliminate this filibuster of judicial nominees; to change the rules in the middle of the game; to stop the checks and balances which are an integral part of our legacy in this democratic form of government.

It is bad enough that this constitutional assault is being planned and discussed. But this morning a new element was introduced into it which is very troubling.

On the front page of the New York Times this morning is an article by David Kirkpatrick entitled, "Frist Set to Use Religious Stage on Judicial Issue."

This article, which I will read from, says as follows:

As the Senate heads toward a showdown over the rules governing judicial confirmations, Senator Bill Frist, the majority leader, has agreed to join a handful of prominent Christian conservatives in a telecast portraying Democrats as "against people of faith," for blocking President Bush's nominees.

Fliers for the telecast organized by the Family Research Council and scheduled to originate at a Kentucky megachurch the evening of April 24, call the day "Justice Sunday" and depict a young man holding a Bible in one hand and a gavel in the other. The flier does not name participants, but under the heading "the filibuster against people of faith," it reads: "The filibuster was once abused to protect racial bias, and it is now being used against people of faith."

Mr. President, this is a delicate issue—the role of religion in America in a democratic society. It is one our Nation has struggled with—not as much as the issue of race and slavery, but close to it since our founding.

The men who wrote this Constitution said that we should be guided by three rules when it comes to religion in America. The three rules were embodied in the first article of the Bill of Rights. It says each of us shall have freedom of religious belief. What does that mean? We can rely on our own conscience to make decisions when it comes to religion. We can decide whether we will believe or not believe, whether we will go to church or not go to church, whether we will be a member of one religion or another. It is our individual conscience that will make that decision.

In addition to that, of course, the Bill of Rights says that this Govern-

ment shall not establish any church; there will not be an official church of America. There is a church of England. There may be religions of other countries, but there will not be a church of America—not a Christian church, not a Jewish synagogue, not a Muslim mosque. There will not be a church of America, according to the Constitution.

The third thing it says, and this is especially important in this aspect of the debate, and this is article VI of the Constitution, is that no religious test shall ever be required as a qualification to any office or public trust under the United States. It couldn't be clearer. We cannot legally or constitutionally even ask a person aspiring to a judicial nomination to what religion they belong. They can volunteer it, they may give us some evidence to suggest what their religious affiliation might be, but we cannot ask it of them, nor can we use it as a test to whether they qualify for office. That is not my decision; it is a decision which I respect in this Constitution, and I have sworn to uphold it.

Now come these judicial nominees, some of whom are controversial, 10 of whom have been subject to a filibuster. They hold a variety of different positions on a variety of different issues. Some of them are purely governmental issues and secular issues, but some are issues which transcend—they are issues of government which are also issues of values and religion.

A person's position on the death penalty is an important question to ask. It is an important part of our criminal justice system. It is also a question of religious belief. Some feel it is permissible in their religion; others do not. So when you ask a nominee for a judgeship, for example, What is your position on the death penalty, you are asking about a provision of our law, but you are also asking a question that may reach a religious conclusion, too. The lines blur.

It isn't just a matter of the issue of abortion. It relates to family planning, to medical research, to the issue of divorce—all sorts of issues cross those lines between government and religion.

I have been on the Committee on the Judiciary for several years. We have tried to be careful never to cross that line to ask a question of religious belief, knowing full well that most of the nominees sent to us had some religious convictions. Our Constitution tells us there is no religious test for public office in America, nor should there be if you follow that Constitution.

So this event, April 24, in Kentucky, by the Family Research Council, suggests the real motive for the filibuster against judicial nominees is because those engaged in the filibuster are against people of faith. They could not be more mistaken. The leader on the Democratic side of the aisle is Senator HARRY REID of Nevada. Senator REID and I have been friends and served together in Congress for over 20 years. I